Supreme Court, U.S.
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IN THE

Supreme Court of the United States

Linda Place, *Petitioner*,

v.

Abbott Laboratories, *Respondent*.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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4/4pp

QUESTION PRESENTED

In determining whether to grant judgment as a matter of law under Fed. R. Civ. P. 50, should an Appellate Judge credit testimony of the movant's self-interested witnesses, disregard evidence favoring the non-movant, and weigh witness credibility?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 215 F.3d 803. It is attached as an appendix. (Op. at A1-16.) The memorandum order of the U.S. District Court for the Northern District of Illinois is unreported. It is also attached as an appendix. (Order of Sept. 30, 1998 at A17-22).

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Seventh Circuit entered on June 1, 2000, by a Writ of Certiorari under U.S.C. § 1254 (1). An extension of time until July 17, 2000 to file a Petition for Rehearing was granted on June 9, 2000. (A23.) The Petition for Rehearing En Banc (filed on June 30, 2000) was denied July 27, 2000. (A24.)

STATUTORY PROVISION INVOLVED

The statute construed is Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), which makes it unlawful for an employer to "discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice . . . or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing" under the statute.

STATEMENT OF THE CASE

In June of this year, this Court restated the standard for Rule 50(b) judgment as a matter of law ("JMOL") in *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___, 120 S.Ct. 2097 (June 12, 2000). The appellate court issued its opinion in this case on June 1, 2000, just eleven days before *Reeves* came down.

In *Reeves*, this Court held that on appellate review of denial of a Rule 50(b) motion, the reviewing court

> must disregard all evidence favorable to the moving party that the jury is not required to believe...That is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.' *Reeves, supra*, at U.S. ___, 120 S.Ct. at 2110 (quoting 9A C. Wright, A. Miller, & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 2529, at 299-300 (1995)).

Petitioner, Linda Place, won a jury verdict against her former employer, Respondent Abbott Laboratories, for retaliation under Title VII, including an award of $389,656 in back pay and $125,000 in compensatory damages. Place proved that, in retaliation for her complaints of sex harassment, Respondent fired her—supposedly for failing to submit to a demand that she submit to psychological evaluation before returning to work from a disability leave. District Court Judge David Coar denied Respondent's Rule 50(b) motion, stating

> a reasonable jury could have found that following her complaint of sexual harassment, Abbot failed to adequately address her charges and when she persisted, she became the villain. The jury could have found that Abbott believed that the entire situation with Place and [the alleged harasser Charles] Harrington was untidy and uncomfortable and, unlike Place, Abbott just wanted the entire matter to go away. When Place persisted, Abbott punished her for her persistence by erecting hurdles for Place to overcome to remain at Abbott. (Order of Sept. 30, 1998 at A20-21).

But on appeal, the Seventh Circuit, ignoring facts favoring Place and citing testimony from Respondent's self-interested witnesses, held that Place failed to prove retaliation as a matter of law and directed entry of a judgment against her. (Op. at A16.) The Seventh Circuit drew inferences in favor of the movant, based on contested testimony from Respondent's employees that the jury could have chosen not to believe.

This case centers on the decision of Abbott management to frustrate Linda Place's efforts to return to work from disability leave, and ultimately to fire her, because her persistent complaints of sex harassment embarrassed the company. On July 15, 1992, Linda Place first complained that she was being sexually harassed by Charles Harrington (Record 176). Place went on leave on November 17, 1991 (Record 220), owing to stress she suffered from the harassment and Respondent's unsuccessful attempts to mitigate the situation (Jt.Exh. 20, Record 88, 236, 435-39). Abbott

management then met on March 17, 1992 both to discuss Place's sexual harassment complaints and to decide what to do about her disability status. (Def.Exh. 18, Jt.Exh.3.; Record 70, 88, 371-372) The coupling of these issues proved lethal to Place's career: Abbott decided that she could not return without a medical clearance. While this meeting featured prominently in Judge Coar's decision denying JMOL (Order of Sept. 30, 1998 at A19), the Seventh Circuit never mentions it.

Respondent decided to block Place two months before she even tried to return to work. Notes by Respondent's head of Employee Assistance, Dr. Rochelle Dainas (Def.Exh. 18; Record 70, 371-372, 373-74), described the March 17, 1992 "Meeting w/ ER (Irena K), Mgr. (?) & Bonnie Tunick re E's allegation re sexual harrassment [sic]." It was there decided that "E[mployee Place] will be sent extended disability form. Before E can return to work, Emp Health will need clear documentation that E can perform her job as required." Notes by another attendee, Dr. Brockton Weisenberger (Jt.Exh. 3; Record 88), Respondent's Director of Corporate Employee Health, confirmed the decision to block Place's return:

> Meeting is held with Nancy Kravcisin-McClain , Bonnie Tunick, Irena Kavaliunas, Dr. Dainas and myself regarding this employee. Ms. McClain discusses multiple difficulties with the employee in the workplace and it is agreed that *should she be released to return to work that she not be allowed to do so by Employee Health* until further discussions are conducted with Personnel and her department manager. (emphasis added.)

When Dr. Weisenberger was asked if it was routine for Abbott to hold such a meeting, he admitted "Oh, no. It is not usual." (Record 805-806.) Abbott employee Susan Smith, supervisor of the benefits office, testified that most employees returning from disability leave are not required to submit to medical examinations (R.1048) and that Respondent's avowed purpose in its benefits book for requesting such examinations is to assess the employees' continued eligibility for disability benefits. (Record 1042-1047.)

Place first sought to return to work on May 15, 1992, with a clearance from her doctor, and again on May 18, (Jt.Exh. 4; Record 88, 229, 238) but, as the jury could infer, Respondent prejudged her fitness for employment two months before—rendering the process a sham. Pointedly, the same folks at Abbott who attended the March 17 meeting were also directly involved in the process of evaluating Place in May. For instance, Place spoke with Dr. Weisenberger about her request on May 18, 1992, who told her that he was concerned because Place had taken leave for mental health reasons. (Record 1098-1100.) He jotted in his notes that Place exhibited "paranoid behavior" (Jt.Exh. 3; Record 88), despite that he admittedly never diagnosed Place (Def.Exh. 181; Record 778-779, 799) and that Place's own doctor Dr. Katie Gienapp unqualifiedly rejected this assessment (Record 444-45). Dr. Dainas also told Place on May 19, 1992 that the only way she could return to work was to submit to an independent medical examination. (Record 239.)

RESPONDENT'S PUTATIVE FACTS RELIED ON BY THE SEVENTH CIRCUIT

Overall, the Seventh Circuit adopted Respondent's

version of events—that Place was a toxic employee who had to be vetted by a psychologist before she could return to work. The Seventh Circuit at key points relied upon contested evidence provided solely by Respondent's witnesses. As Respondent's trial attorney succinctly admitted at trial about one such witness, "Obviously he is biased. He's an employee of the company." (Record 621.) Place countered Respondent's characterizations with the company's own documents, admissions by Abbott staff and her personal recollection of the events.

1. "While working at Abbott, Place appears to have been a tempestuous, high-maintenance employee who did good scientific work but had regular run-ins with her supervisors and co-workers." (Op. at A12.) But Judge Coar noted just the opposite in his opinion: "At the time of her [August 1991] discussions with [Abbott's Gene] Cartwright, the only time that anyone had ever discussed her interpersonal skills had to do with a joking reference she had made about a desk.." (Order of Sept. 30, 1998 at A18; Record 148-49.) Whatever interpersonal problems may have occurred, Place testified, resulted from stress caused by Respondent's reorganization of her group and change of her duties—stress experienced by other Abbott employees (Record 143-144, 187-89, 567)—and continued friction with the accused harasser (Record 189-92). Her record of dealing with others, the jury could have found, was generally free of complaints. (Record 88, 90, 184-88, 353-57, 506, 741-42; Jt.Exh. 13, Jt.Exh. 14.)

Evidence supporting the Seventh Circuit's portrayal of Place came almost entirely from current Abbott manager Meta Franklin (Record 463), who at one time supervised Place. The Seventh Circuit notes

Franklin's testimony that Place once heatedly told Franklin, "You'll pay for that" (in response to Franklin's decision to exclude Place from a meeting), but Franklin herself was unable to explain on direct why this allegedly threatening incident was not written up, noted in Franklin's work log or made the subject of a disciplinary action. (Record 565-66.) Franklin's September 19, 1991 evaluation of Place (Jt.Exh.16; Record 88, 192-97) states that she "at times" experienced "inappropriate anger towards others," but this review (in the light most favorable to Place) hardly describes an employee about to come unglued.

2. "Even Place's own psychologist, Katie Gienapp, who believed Place was ready to return to work and posed no danger, testified that she could understand why an employer might want a second opinion." (Op. at A12.) This distorts Dr. Gienapp's position, who—though admitting that companies periodically seek independent medical examinations for "procedural" reasons—testified that she did not believe Place to be a danger and did not share Dr. Weisenberger's assessment that such an examination was warranted in this case. (Record 445-46.) One of Respondent's own witnesses (Jeff Powell) bolstered Dr. Gienapp's credibility on cross-examination. (Record 948-50.)

3. "The company did not require an independent medical evaluation of every employee who wished to return to work from disability leave, but requiring such an examination was not unusual. Every year, several employees coming back from disability leave were first sent to

> independent medical evaluations that involved psychological evaluation, according to Brockton Weisenberger, at the time Abbott's director of corporate employee health." (Op. at A11.)

Dr. Weisenberger was admittedly the decision-maker with regard to Place's evaluation and return to work. (Record 797-98, 807-08.) The only factors that Dr. Weisenberger testified would have gone into the decision to subject an employee to a medical examination—the safety of the employee and co-workers (Record 794-95)—were simply not presented in Place's case, as the jury evidently concluded that there was no indication of dangerousness. (The only evidence of "dangerousness" was undocumented charges by an interested witness, Meta Franklin.) Moreover, the medical examination was not undertaken to predict future dangerousness or to determine if Place could perform her job; it was to evaluate Place (according to the IME provider John Jochem's testimony) for "characteristic signs and symptoms of a psychiatric disorder." (Record 714-16.)

4. "In this case, however, the evidence does not support the inference that Place was being singled out." (Op. at A13.) To the contrary, we noted above the strong circumstantial evidence that Place's disability status was linked to her harassment claims, because both were discussed at the same March 17, 1992 meeting. This evidence was not cited by the Seventh Circuit. The Seventh Circuit also overlooked testimony of another Abbott employee (Nanette Boryc) who had been out on disability leave for similar reasons as Place, and who testified that to return to work, all she was

required to do was bring a note from her doctor to Employee Health. (Record 1106-1107.) And there was evidence that Respondent manipulated the independent medical examination to assure Place's failure. Respondent (through Drs. Weisenberger and Dainas) poisoned the well be describing Place ahead of time to the IME provider as manipulative, intimidating, disruptive, and paranoid. (Record 700-02, 716-17.) But Respondent's own witness Dr. Dainas also admitted to the provider that she herself did not consider Place to be a danger at Abbott. (Record 717.)

5. "Place introduced no evidence that similarly situated individuals were treated differently." (Op. at A11.) Yet nowhere does the Seventh Circuit even mention the list of 19 former co-workers compiled from Respondent's own records, which was accepted into evidence as Plaintiff's Exhibit 59. All these employees were from the same departments as Place, all but one had taken a disability leave, all had been returned to work following the leave, none had been required to submit to an independent medical examination, and none had engaged in a protected activity. (Pl.Exh.59; Record 88.)

Place coupled this evidence with a further compilation from Respondent's records of a random sampling of 100 files of all those Abbott employees who had been required to submit to psychological evaluation. (Jt.Exh.2; Record 88, 411-412, 751-752.) These records showed an employee who refused the evaluation and was subsequently returned to work. (Record 753.) Respondent tried to lessen the damage to its case caused by this evidence by suggesting a new spin on the records' origin, that they were voluntary Employee Assistance requests, not mandatory IMEs as Place's was.

(Record 755.) District Judge Coar resolved this evidentiary dispute by deciding that Respondents had been ordered to sample all records, including IMEs. (Record 1011.) Thus the jury was free to reject Respondent's new spin, and to conclude that these records included *all* requests for psychological evaluation, not just voluntary requests. Yet the Seventh Circuit again adopted Respondent's version: "[Place] pointed to records indicating that one unidentified Abbott employee was allowed to continue to work despite refusing a psychological evaluation, but in that case the evaluation had been recommended after the employee had been voluntarily involved in Abbott's employee assistance program." (Op. at A11-12.) As the trial judge correctly observed, "What to do with the information is for the jury to decide." (Record 1012).

6. "Because Place refused to undergo the independent medical examination, Abbott refused to let her return to work." (Op. at A5.) Here the Seventh Circuit puts the cart before the horse, ignoring both that Respondent decided to refuse to allow Place to return to work a good two months before Place even tried to do so (Def.Exh. 18, Jt.Exh 3; Record 70, 88, 371), and that Respondent did in fact stop Place from returning to work four days before it ever informed her she must first submit to a psychological evaluation. (Jt.Exh. 4; Record 88, 238, 239). The Seventh Circuit missed what did not escape the jury, who answered "yes" to the special interrogatory, "Was Abbott's refusal to reinstate Place without an independent medical examination an act of retaliation?" (Op. at A10.)

REASONS FOR GRANTING CERTIORARI

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE SEVENTH CIRCUIT'S OPINION IS IN DIRECT CONFLICT WITH AN INTERVENING U.S. SUPREME COURT DECISION.

In *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___, 120 S.Ct. 2097 (June 12, 2000), this Court unanimously reinstated a verdict for an ADEA plaintiff that had been yanked away on appeal. A jury awarded a $35,000 verdict (doubled to $70,000 on a finding of willfulness) to Roger Reeves, age 57, whose employer fired him after 40 years of service, in violation of the ADEA. *Id.* at U.S. ___, S.Ct. 2103-2104. The employer claimed it fired Reeves because he kept inaccurate time records. *Id.* at U.S. ___, S.Ct. 2103. Reeves testified not only that the employer was wrong about the recordskeeping, but that his much-younger supervisor made crude, childish remarks about Reeves' age—the most colorful of which was that plaintiff "was so old that [he] must have come over on the Mayflower." *Id.* at U.S. ___, S.Ct. 2110. On appeal, the Fifth Circuit reversed denial of judgment as a matter of law under Rule 50(b), concluding that Reeves had failed to present enough evidence to prove that age, rather than plaintiff's performance, motivated his termination. *Id.* at U.S. ___, S.Ct. 2104.

This Court's decision—reversing the Fifth Circuit—reiterated the JMOL standard that a reviewing court "may not make credibility determinations or weigh the evidence." *Id.* at U.S. ___, S.Ct. 2110. It added this fillip:

> Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party

> that the jury is not required to believe... *That is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.'* *Id.* (emphasis added, quoting Wright, Miller, & Cooper, *supra*, § 2529, at 299-300).

Judgment as a matter of law conversely should not rely on the testimony of movant's *interested* witnesses, because a jury already evaluated and discounted their credibility in the glare of trial. JMOL suits only such cases where "the record *conclusively* revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was *abundant and uncontroverted independent evidence* that no discrimination had occurred." *Id.* at U.S. ___, S.Ct. 2109 (emphasis added).

The Seventh Circuit here, without the benefit of the *Reeves* decision, missed that decision's touchstone: that JMOL should not rely on the *losing* party's contested testimony. Two witnesses expressly cited by the Seventh Circuit, Drs. Weisenberger and Dainas, were directly involved in the process of freezing Place out of Abbott and were hardly disinterested. Additionally, the Seventh Circuit omitted salient facts from the plaintiff's case—especially that Abbott management had a single meeting devoted both to Place's harassment complaint and her pending return to Abbott from disability leave. *Reeves, supra*, at U.S. ___, S.Ct. 2111 (court of appeals erred by disregarding "critical evidence favorable to [the

non-movant]"). Further, the evidence supporting Respondent's supposed need for a psychological exam of Place came primarily from a single, interested Abbott witness (Franklin), contradicted by another witness (Dr. Dainas).

According to the Seventh Circuit, "[a]ll Place had to do was spend a short amount of time, at Abbott's expense, with a psychologist. If she had done that, she probably would have gotten her job back." (Op. at A13.) This conclusion not only lacks support in the record, but it is hardly *conclusive* or based on "uncontroverted independent evidence," as *Reeves* would require. *Id.* at U.S. ___, S.Ct. 2109. As District Judge Coar concluded, there was another inference supported in the record: that "Abbott punished [Place] for her persistence by erecting hurdles for Place to overcome to remain at Abbott." (Order of Sept. 30, 1998, A21.) The jury sensibly opted for the latter version and the Seventh Circuit erred by directing a verdict in favor of Respondent.

Compounding its error, the Seventh Circuit nakedly fashioned credibility findings against Place. *Reeves, supra*, at U.S. ___, S.Ct. 2110 (reviewing court "may not make credibility determinations"). It plastered its opinion with a host of irrelevancies, all grossly prejudicial to plaintiff. At one point, the appellate court compared Place to a crazed, gun-toting saboteur (Op. at A13), a colorful but baseless grotesquery. The opinion also pointlessly recounted salacious testimony, such as that the alleged harassment began at a Christmas party, that plaintiff was drunk at the time, that sexual relations continued for six months and that plaintiff was married at the time. (Op. at A2-3.) Although the Seventh Circuit deemed the "details of this encounter...worth recalling," (Op. at A2) they are not mentioned again in the legal analysis. The only conceivable reason for including this

litany (besides to humiliate Place personally) was to tee up a reference to Judge Coar's adverse credibility findings in the bench trial on her harassment claim. (Op. at A4.) Such resort to credibility violates *Reeves* and Rule 50.

The above shows that it is readily apparent that the Seventh Circuit's opinion is in direct conflict with an intervening case, *Reeves v. Sanderson Plumbing Products, Inc.* For these reasons, this Court should grant certiorari and reverse the Seventh Circuit's decision summarily, on the authority of its own intervening decision. *Helvering v. Wiese*, 292 U.S. 614 (1934). In the alternative, the decision should be vacated and the case should be remanded to the Seventh Circuit for further consideration in light of *Reeves*.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE CASE PRESENTS AN ISSUE OF GREAT NATIONAL IMPORTANCE.

As this Court recognized when it accepted the *Reeves* case, the extent of appellate court review of jury verdicts is an important national issue. The *Reeves* case and the case here both raise the same issues on an appellate court's discretion to re-weigh evidence, make its own credibility judgments, and select which evidence will be considered on review.

This Court and legal commentators have discussed the importance of preserving the jury's function as fact-finder upon judicial review. *See, e.g., Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500 (1957); Eric Schnapper, *Judges Against Juries*, 1989 WIS. L. REV. 237.

By an accident of timing, this case was decided a mere 11 days before *Reeves* came down. This question was important enough to warrant review in *Reeves*, and

the issue remains urgent today, as the Seventh Circuit opinion invades the function of the jury. Fundamental fairness requires that this case be accorded U.S. Supreme Court review as in *Reeves*.

CONCLUSION

This case presents important questions of the role of the jury in employment discrimination cases. The United States Court of Appeals for the Seventh Circuit took a different approach than that established by this Court in an intervening case, *Reeves v. Sanderson Plumbing Products, Inc.*; therefore review by this Court is warranted. The Seventh Circuit's decision should be vacated and the jury's verdict affirmed in light of *Reeves*, or at the least, the case should be remanded to the Seventh Circuit for further consideration in light of *Reeves*.

Respectfully submitted,

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APPENDIX

*803 215 F.3d 803
83 Fair Empl.Prac.Cas. (BNA) 143

United States Court of Appeals,
Seventh Circuit.

Linda PLACE, Plaintiff-Appellee/Cross-Appellant,
v.
ABBOTT LABORATORIES, Defendant-Appellant/Cross-Appellee.
Nos. 99-2418, 99-2971.
Argued April 21, 2000.
Decided June 1, 2000.

Before BAUER, KANNE, and EVANS, Circuit Judges.

TERENCE T. EVANS, Circuit Judge.

We hope this musty Title VII case is one of the last we will see in which events straddle the enactment of the Civil Rights *805 Act of 1991. And we say good riddance to such cases for they put the district court in the delicate position of parceling out what must be decided by the judge and what may be decided by a jury. A good deal of this saga preceded the pivotal date of November 21, 1991, when the new law for the first time gave Title VII litigants the right to a jury trial and allowed plaintiffs to seek punitive and compensatory damages. 42 U.S.C. s 1981a. These changes in the law, of course, are not retroactive to conduct that occurred prior to November 21, 1991. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994).

Linda Place began working at Abbott Laboratories

in 1986 as a biology research associate. In a rather hackneyed development, she and her supervisor, Dr. Charles Harrington, got drunk at a company Christmas party in December 1990 and afterward found their way into the same hotel bed.[1] The details of this encounter are worth recalling.

The Christmas party, attended by assorted Abbott scientists, chemists, and technicians, was at the Princess restaurant in Libertyville, and the wine was flowing. After several hours, some of the revelers,

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[1]The district court found that the post-Christmas party rendezvous was consensual. At the risk of playing the Grinch, however, we note that office Christmas parties also seem to be fertile ground for unwanted sexual overtures that lead to Title VII complaints. *See, e.g., Marshall v. Cascade Utils.*, 1999 WL 893578, *1 (9th Cir.1999); *Pesso v. Montgomery Gen. Hosp.*, 1999 WL 326090, *1 (4th Cir.1999); *Bryson v. Chicago State Univ.*, 96 F.3d 912, 914 (7th Cir.1996); *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1347-48 (7th Cir.1995); *Morgan v. Massachusetts Gen. Hosp.*, 901 F.2d 186, 188 (1st Cir.1990); *King v. Board of Regents of the Univ. of Wis. Sys.*, 898 F.2d 533, 535 (7th Cir.1990); *Duchon v. Cajon Co.*, 1988 WL 12800, *1 (6th Cir.1988); *Jones v. Flagship Int'l*, 793 F.2d 714, 716-17 (5th Cir.1986); *Afrassiabian v. ProCredit Holdings, Inc.*, 1999 WL 605589 (E.D.Pa.1999); *Mills v. Wex-Tex Indus., Inc.*, 991 F.Supp. 1370, 1377 (M.D.Ala.1997); *Simpson v. Martin, Ryan, Andrada & Lifter*, 1997 WL 542701, *1 (N.D.Cal.1997); *Rivera v. City of New York*, 1997 WL 539776, *1 (S.D.N.Y.1997); *Corrigan v. Labrum & Doak*, 1997 WL 76524, *2 (S.D.N.Y.1997); *Alvey v. Rayovac Corp.*, 922 F.Supp. 1315, 1318 (W.D.Wis.1996); *Webb v. J. Merle Jones & Sons, Inc.*, 1995 WL 573432, *3 (N.D.Ill.1995); *Schaffer v. Ames Dep't Stores, Inc.*, 889 F.Supp. 41, 42 (D.Conn.1995); *Henry v. Gehl Corp.*, 867 F.Supp. 960, 966 (D.Kan.1994); *Richardson v. Great Plains Mfg., Inc.*, 1994 WL 324553, *3 (D.Kan.1994); *Johnson v. Indopco, Inc.*, 834 F.Supp. 1039, 1045 (N.D.Ill.1993); *Babcock v. Frank*, 783 F.Supp. 800, 806-07 (S.D.N.Y.1992); *Showalter v. Allison Reed Group, Inc.*, 767 F.Supp. 1205, 1208, 1210 (D.R.I.1991); *Christoforou v. Ryder Truck Rental, Inc.*, 668 F.Supp. 294, 299 (S.D.N.Y.1987).

including Place and Harrington, repaired to the apartment of fellow worker Peggy Connerty in Evanston. Place and Harrington drove together in Place's Camaro because she had had too much to drink and Harrington was in "better shape." More drinking followed at Connerty's, but that apparently ended when the host passed out.

After the Connerty shindig broke up, Place and Harrington returned to the restaurant where Harrington had left his car. Harrington drove Place's car because, as she testified, she "wasn't capable of driving." During this return trip, Harrington suggested they go to a hotel--instead of their separate ways--after they got to his car. Place said she had no desire to accept Harrington's proposition but, rather inexplicably, she and Harrington then drove to a motel in their separate cars. A sexual encounter followed.

The Christmas party tryst mushroomed into a sexual affair that lasted around 6 months. Place could not recall the number of sexual encounters but did remember some of the locations, including behind a locked door in an Abbott lab, outside in a forest preserve, and in a condominium she owned with her husband (Place was married, as was Harrington).

Place testified that the relationship was coercive from start to finish and that she had sex with Harrington--over a 6-month period--only because he controlled her *806 performance evaluation. Harrington said the affair was entirely consensual and denied telling Place that she would get a better job evaluation if she had sex with him. District Judge David H. Coar, in rejecting Place's sexual harassment

claim, found her to be a less than impressive witness. As to the Christmas party liaison, for example, Judge Coar found "that neither plaintiff nor Harrington is credible" but that Harrington's testimony was more believable.

During the spring following the Christmas party, Abbott promoted Place from a grade 13 to a grade 15 scientist and, as part of routine restructuring, transferred her to a different job where Harrington no longer was her supervisor, though she still regularly had to work with him.

In July 1991, after the affair ended, Place complained to Abbott that Harrington was sexually harassing her. Abbott investigated, warned Harrington, set up an arrangement where Harrington and Place could speak to each other only in the presence of a third party, and in October 1991 transferred both Harrington and Place to other jobs where they wouldn't have to deal with each other. Though they retained their same titles, pay, and benefits, both considered the moves demotions. Place said she lost her supervisory responsibilities, her office, her telephone, and had to do boring laboratory bench work. Abbott denies that Place's transfer was a step down, noting that in her new position Place performed duties previously done by a grade 17 scientist and that she needed time to familiarize herself with her new research project.

Place claimed that because of the affair, the harassment, and the transfer, her emotional state deteriorated to the point where, in November 1991, she took a medical leave of absence. Financially, this

was not too bad a deal because she received her full salary for 6 months and lesser benefits for 6 weeks after that. But Abbott terminates the employment of anyone who fails to return to work from disability leave within one year (though long-term disability payments might continue thereafter), and in May 1992, when her 6 months of full-time disability benefits expired, Place's psychologist cleared her to return to work. Abbott insisted, however, that she first undergo an independent medical examination and referred her to an outside psychologist, John Jochem. Fearing that she was being set up for failure, Place snapped on her tape recorder when the session with Jochem began. When he balked at being taped, Place walked out. Because Place refused to undergo the independent medical examination, Abbott refused to let her return to work. When Place failed to return to work within one year, Abbott terminated her as an employee.

Unable to find another science job, Place went to law school and now is a solo practitioner in Waukegan, where she has--apparently successfully--represented other former employees who have sued Abbott. She also filed her own ADA, ERISA, and Title VII claims against Abbott. The ADA and ERISA claims were knocked out on summary judgment, but the Title VII case went to trial.

[1] Judge Coar was the finder of fact on Place's sexual harassment claim (involving events that occurred prior to November 21, 1991) and a jury was the finder of fact on the retaliation claim (involving events that took place both before and after November 21, 1991). Judge Coar found that Place had not been sexually harassed, a decision that she does not appeal.

A plaintiff whose underlying discrimination claim fails may still prevail on a claim that she was retaliated against for complaining about discrimination, *see Pryor v. Seyfarth, Shaw, Fairweather & Geraldson*, 212 F.3d 976 (7th Cir.2000), and Place did so. The jury found that Abbott retaliated against Place and awarded her $389,656 in lost wages and $125,000 in compensatory damages, for a total of $514,656. Abbott appeals that outcome. Judge Coar denied Place front pay and would not let her pursue punitive damages. *807 Place cross-appeals those decisions. (Place had counsel at trial, but handled her appeal *pro se*.)

Place's retaliation claim is founded on two events: first, her transfer in October 1991 to a different position at Abbott, and second, the company's insistence in May 1992 that she undergo an independent medical examination, her refusal of which led to her dismissal in December 1992.

[2] To understand Place's retaliation claim, the jury obviously needed to hear about what happened before November 21, 1991. *See Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1349 (7th Cir.1995). Judge Coar, however, allowed in the pre-November 1991 evidence not just as explanatory background information, but also for purposes of liability and compensatory damages under the continuing violation theory. As a question of law made in the context of denying Abbott's Rule 50 motion, we review that decision *de novo*.

[3][4] The continuing violation theory allows a plaintiff to reach back to get relief for an act of discrimination that occurred outside the statute of

limitations by linking it as one continuous act with a discriminatory act that took place within the limitations period. *See Miller v. American Family Mut. Ins. Co.*, 203 F.3d 997, 1003-04 (7th Cir.2000); *Speer v. Rand McNally & Co.*, 123 F.3d 658, 663-64 (7th Cir.1997); *Selan v. Kiley,* 969 F.2d 560, 564-65 (7th Cir.1992). "A continuing violation is one that could not reasonably have been expected to be made the subject of a lawsuit when it first occurred because its character as a violation did not become clear until it was repeated during the limitations period." *Dasgupta v. University of Wis. Bd. of Regents,* 121 F.3d 1138, 1139 (7th Cir.1997).

Whether the theory may be applied to the situation at hand is unsettled. *Landgraf*, 511 U.S. 244, 114 S.Ct. 1483, which held that the changes brought about by the Civil Rights Act of 1991 were not retroactive, did not involve a claim that straddled November 21, 1991, but rather was a case in which the conduct already had taken place and the case already was pending when the new law took effect. On the one hand, *Landgraf* seems to dig a moat between plaintiffs seeking compensatory and punitive damages and anything that occurred before November 21, 1991. On the other hand, the logic of the continuing violation theory that stitches old and new conduct together into one seamless violation for statute of limitation purposes would seem to apply with equal force to the nonretroactivity of a new law. *See* Leonard Charles Presberg, *The Civil Rights Act of 1991, Retroactivity, and Continuing Violations*, 28 U. RICHMOND L. REV. 1363, 1402-04 (1994). We have suggested that the continuing violation theory "is utilized only in the context of a challenge to the timeliness of a cause of

action," *Taylor v. Western and S. Life Ins. Co.*, 966 F.2d 1188, 1196 (7th Cir.1992), but this single sentence made in a different context is hardly dispositive. The circuits that have tackled this issue head-on have split. *Compare Tomasello v. Rubin,* 167 F.3d 612, 620 (D.C.Cir.1999) ("an award of compensatory damages for preenactment conduct would have an impermissible effect"), *and Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216, 1220 n. 1 (8th Cir.1997) ("[w]e are not familiar with any Eighth Circuit law where the concept of continuing violation, ordinarily associated with statutes of limitations issues, has been employed to overcome a non-retroactivity rule") *with DeNovellis v. Shalala,* 124 F.3d 298, 307 n. 4 (1st Cir.1997) ("a continuing violation theory could be applied to any time requirement imposed by Title VII, whether it be the effective date of an amending statute, as here, or a statute of limitations"). Resolving this nettlesome legal issue is unnecessary to resolving this appeal, however, because the two alleged acts of retaliation against Place simply do not fit the continuing violation mold.

*808 [5][6] We have recognized three types of continuing violations: where the exact day of the violation is difficult to pinpoint because the employer's decisionmaking process takes place over a period of time; where the employer has a systematic, openly espoused policy alleged to be discriminatory; and where the employer's discriminatory conduct is so covert that its discriminatory character is not immediately apparent. *Selan*, 969 F.2d at 565. The first two scenarios clearly do not apply to this situation and the third does not fit, either. The covert variant applies to plaintiffs who realize only with the benefit of hindsight that they were discriminated against.

Moskowitz v. Trustees of Purdue Univ., 5 F.3d 279, 281-82 (7th Cir.1993). If, however, the plaintiff "knows or with the exercise of reasonable diligence would have known after each act that it was discriminatory and had harmed" her, the plaintiff must sue over that act within the regular statute of limitations. *Id.* at 282.

[7][8] Applying the continuing violation theory to this situation would require the retaliatory nature of Place's (pre-November 1991) internal job transfer to be so subtle that she did not recognize it as retaliatory until the (post-November 1991) independent medical examination demand. The continuing violation scenario makes most sense in a sexual harassment case, where the first offensive comment or inappropriate touch may not alert the victim to the harassing quality of the conduct. *See Galloway v. General Motors Serv. Parts Operations*, 78 F.3d 1164, 1166 (7th Cir.1996). A job transfer is quite different. Like being fired, demoted, or not promoted, a job transfer is a single, significant event, not a continuing act. *See Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 907 (2d Cir.1997). Unlike low-level harassment that over time grows in intensity or in cumulative effect, a job transfer is a concrete, discrete development. If Place's transfer into a different job where she held the same title and received the same pay was retaliatory at all, its retaliatory nature was immediately palpable. Because Place could have known at the time that the transfer was retaliatory--if indeed it was retaliatory--she cannot through the continuing violation theory link her transfer to Abbott's independent medical examination requirement some 8 months later.

Consequently, the district court erred in allowing the jury to consider Place's October 1991 transfer for purposes of liability and damages. The jury's retaliation decision should have been based only on the company's demand in May 1992 that she undergo an independent medical examination, a demand that when defied led to Place's termination.

Place argues, however, that this error was harmless. The jury answered "yes" to a special interrogatory that asked: "Was Abbott's refusal to reinstate Place without an independent medical examination an act of retaliation?" Because the independent medical examination issue was properly within the jury's bailiwick, and because the jury explicitly found the examination requirement retaliatory, Place believes that part of the verdict is valid. As a result, she says that at least the $389,656 she was awarded in back pay should stand, since that part of the award stemmed from her termination that resulted from her refusal to undergo an unrecorded independent medical examination.

[9] We disagree, for two reasons. First, the jury's finding of liability might have been improperly influenced by Place's effort to prove that her transfer was retaliatory. As we mentioned earlier, the jury would have heard this evidence in any event. Because the jury was not instructed that this evidence could not be taken into account in determining liability and damages, however, what should have been outside the jury's purview might have seeped into the jury's decision regarding liability. We will never know whether the jury thought the job transfer was retaliatory because no interrogatory was given on that

question, and we cannot speculate on whether the jury's decision was rooted *809 solely on a permissible ground or on both permissible and impermissible grounds.

[10][11][12] Second, no reasonable jury could have found Abbott's independent medical examination requirement retaliatory. We review *de novo* a trial court's grant or denial of judgment as a matter of law under Federal Rule of Civil Procedure 50. *Mathur v. Board of Trustees of S. Ill. Univ.*, 207 F.3d 938, 941 (7th Cir.2000). The question is whether a rational jury could have reached the result this jury reached. *Id.* In deciding this question, we may not substitute our view of contested evidence for the jury's. *Id.*

The record does not support an inference that Abbott was retaliating for Place's earlier complaints of sexual harassment by requiring her to take an independent medical examination before returning to work from a long disability leave. Abbott required any employee who had been out on disability leave for at least 5 days to coordinate their return to work with the company's health department. The company did not require an independent medical evaluation of every employee who wished to return to work from disability leave, but requiring such an examination was not unusual. Every year, several employees coming back from disability leave were first sent to independent medical evaluations that involved psychological evaluation, according to Brockton Weisenberger, at the time Abbott's director of corporate employee health. Place introduced no evidence that similarly situated individuals were treated differently. She pointed to records indicating

that one unidentified Abbott employee was allowed to continue to work despite refusing a psychological evaluation, but in that case the evaluation had been recommended after the employee had been voluntarily involved in Abbott's employee assistance program. By contrast, Place had been out on disability leave and was required to undergo an independent medical examination by the company's health department.

While working at Abbott, Place appears to have been a tempestuous, high-maintenance employee who did good scientific work but had regular run-ins with her supervisors and co-workers. When one of Place's supervisors, Meta Franklin, made a decision Place didn't like, Place angrily leaned forward and threatened: "You'll pay for that." Franklin also testified that on another occasion she saw Place threaten a co-worker, Ms. Connerty (the host, you'll recall, of the post-Christmas party get-together), with whom she wasn't getting along. Weisenberger said he was concerned that Place was so angry at the company that she might do harm if returned to the workplace. Even Place's own psychologist, Katie Gienapp, who believed Place was ready to return to work and posed no danger, testified that she could understand why an employer might want a second opinion.

We do not hold, as Abbott suggests, that requiring an independent medical examination could never constitute an adverse employment action. For example, an employer that never required men, but always required women, to undergo independent medical examinations before returning to work from

disability leave would almost certainly be discriminating. In this case, however, the evidence does not support the inference that Place was being singled out. There also is no evidence that the independent evaluation had been rigged against her or that Abbott played any role in Jochem's refusal to let Place tape-record their session. Abbott had a discretionary policy to require independent medical examinations when its health department thought they were warranted. Place's previous threats to other Abbott employees, the emotional problems that prompted her disability leave, and her continuing anger at the company all raised warning flags. In a business where the destruction of equipment and research records could do great damage, and in an era when disgruntled workers all too regularly take out their frustrations with a gun, Abbott's desire to get a second opinion *810 before welcoming Place back to work hardly seems unreasonable. All Place had to do was spend a short amount of time, at Abbott's expense, with a psychologist. If she had done that, she probably would have gotten her job back. If Abbott still had barred the door after the evaluation showed she was fit to return to work, then she would have a strong case for retaliation. But under these circumstances no reasonable jury could have concluded that the company's requirement for an independent psychological evaluation was payback for Place's complaints of sexual harassment nearly a year before.

The question that remains is whether Place's claim that her pre-November 1991 internal transfer constituted retaliation, which was erroneously considered by the jury the first time, must now be

remanded to Judge Coar. We think not, again because for two reasons no reasonable finder of fact could find that the transfer was retaliatory.

[13][14] First, whether the transfer constituted an adverse employment action is dubious. The fact that Place received the same pay and benefits and held the same title in her new position does not necessarily preclude her retaliation claim, for "adverse actions can come in many shapes and sizes." *Knox v. Indiana,* 93 F.3d 1327, 1334 (7th Cir.1996) ("[n]o one would question the retaliatory effect of many actions that put the complainant in a more unfriendly working environment: actions like moving the person from a spacious, brightly lit office to a dingy closet"). On the other hand, being shifted to an essentially equivalent job that Place did not happen to like as much does not a Title VII claim create. *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir.1996) ("[o]therwise every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit"). Place's beef is that she was moved from an interesting job she liked that involved overseeing several other people to a boring job she didn't like and that lacked any supervisory duties. Some of her complaints--losing her telephone and cubicle--are too trivial to amount to an adverse employment action. Maybe her new working quarters were not as nice, but there is no indication they were shabby or unpleasant. Being moved from one job to another also does not meet the test. There was no guarantee that Place would remain forever in the job she held before her transfer. Researching, creating, and preparing for mass production pharmaceutical products is a dynamic business that

involves regularly shifting people from one job to another, as one project is completed and another is begun. Her most viable complaint is that she had diminished responsibilities. However, Place's predecessor in the job she found so dull held a higher grade level. Place could not expect to jump into a new project at the top. As she became more familiar with her new work she might have enjoyed it more and might over time have gained more responsibilities. But she only lasted a month before going on disability leave. Place did not have supervisory responsibilities in her new job, but some grade 15 positions at Abbott involve supervisory duties and others do not. Supervising other workers in one capacity did not mean that person would always have supervisory duties thereafter.

[15] Second, even if the new position was a step down, there is no evidence that the decision to move Place was retaliatory. The sequence of events was: (1) Place and Harrington have an affair, (2) Place moves to a new position where she still works with Harrington but he no longer is her supervisor, (3) the relationship sours, (4) Harrington is a pain in the neck for Place to deal with and Place's project suffers as a result, (5) Place complains that Harrington is sexually harassing her, (6) Abbott warns Harrington, (7) Abbott creates an arrangement where Place and Harrington may interact only in the presence of a third party, (8) the project still is suffering because of the Place-Harrington friction, *811. and (9) Abbott moves both Place and Harrington into different jobs. The fact that two people do not get along after their office romance sours is not sexual harassment, and an employer's decision to split up two workers whose interpersonal

problems are impeding the company's progress is not retaliation. One view of the evidence might suggest that Harrington was the bigger problem and Abbott might have acted unwisely and unfairly in taking Place off the project. Title VII, though, doesn't guard against unwise or unfair decisions unless those decisions also were discriminatory or retaliatory. The end of the affair led to the problems between Place and Harrington. It was those problems--not Place's complaint of sexual harassment-- that in turn led Abbott to transfer them both elsewhere.

The judgment in favor of Ms. Place is REVERSED. The case is REMANDED to the District Court for the entry of judgment in favor of Abbott Laboratories.

Not Reported in F.Supp.2d
(Cite as: 1998 WL 708801 (N.D.Ill.))

Linda Place, Plaintiff,
v.
Abbott Laboratories, Inc., Lake-Cook Psychologists and Counseling Associates, Defendants.

No. 94 C 5491.

United States District Court, N.D. Illinois.

Sept. 30, 1998.

MEMORANDUM OPINION AND ORDER

COAR, J.

*1 This matter is before the court on the defendant Abbott Laboratories' (Abbott") Motion for Judgment as a Matter of Law pursuant to Rule 50(b) following a jury verdict in favor of plaintiff Linda Place ("Place").

FACTS

A reasonable jury could have found the following facts:
(1) Place began working at Abbott in 1986.
(2) At some point, Charles Harrington became her manager.
(3) Place and Harrington began a sexual relationship beginning in December 1990 that continued until May or June 1991.
(4) Harrington continued as Places's supervisor until either December 1990 or April 1991. Even after he was

no longer her supervisor, Harrington had oversight responsibility for the group to which Place was assigned and her job duties required her to obtain information and input from Harrington.

(5) On July 15, 1991, Place met with Sue Jaap of Abbott's Employee Relations Department and complained that she had been sexually harassed by Harrington. Jaap told Place that she would investigate the charges and "get back" to her.

(6) Jaap and Cartwright instituted an intermediary system in which Mehta Franklin would serve as intermediary between Place and Harrington; Place would bring her requests for information through Franklin to Harrington. Harrington, in turn, would relay the requested information through Franklin to Place. Franklin then began to closely scrutinize Place.

(8) The intermediary system was awkward and Place complained that it was not working. Franklin agreed and reported her agreement to Cartwright, who said that he had no other solutions. Cartwright suggested transferring Place because of her lack of interpersonal skills. This conversation occurred in August 1991.

(9) At the time of her discussions with Cartwright, the only time that anyone had ever discussed her interpersonal skills had to do with a joking reference she had made about a desk.

(10) Eventually the intermediary system was dropped, but Place continued to have difficulty getting the necessary feedback from Harrington.

(11) On October 15, 1991, Place met with Jaap and told her that unless Abbott could guarantee that she would not have to meet with Harrington, she (Place) did not want to continue to work on the project (that required interaction with Harrington).

(12) Place was quite persistent in complaining about

what she perceived to be Abbott's failure to appropriately remedy the situation with Harrington.
(13) On October 16, 1991, Jaap said that Place would be transferred on October 21, 1991 but that she did not know where she would be assigned. Jaap told Place that Harrington would also be transferred.
(14) Place was transferred to a group headed by Bill Grosshopf. The new assignment had significantly reduced responsibilities and status.
(15) Grosshopf subjected Place to increased surveillance.
*2 (16) On November 7, 1991, Place took a disability leave of absence from her position at Abbott because she was not coping well with the stresses at Abbott.
(17) On March 17, 1992, while Place was on disability leave, a meeting was held concerning Place. Present at the meeting were the following:

1) Dr. Broch Weisenberger of Abbott's Employee Health Department;
2) Chelle Dana, Head of Employee Assistance;
3) Nancy Kravcisin-McClain, Human Resources; and Bonnie Junich, staff attorney.

(18) At that meeting, it was decided that if Place were to be released (by her doctor) to return to work, the Employee Health Department would contact Place's manager and the Human Resources Department, and they would decide what to do.
(19) At the March 17, 1992 meeting, Place's sexual harassment claim was discussed.
(20) Place's doctor released her to return to work on May 15, 1992. When she advised Abbott that she would like to return, she was told that before she could return she would be required to have an independent examination by a psychologist selected by Abbott.
(21) Some, but not all, employees at Abbott have been

required to have an independent psychological examination before returning from an extended leave of absence for psychological reasons. Requiring Place to submit to an examination was in retaliation for her persistence in seeking relief for the alleged harassment by Harrington.
(22) The psychologist selected by Abbott refused to allow her to tape record the examination and she left before the examination could be given.
(23) Abbott then terminated Place for the stated reason that she failed to return to work.

Abbott makes three pointed arguments in support of its Rule 50 motion: (1) Abbott's stated reason for terminating Place was failure to submit to psychological testing following her disability leave of absence and she has offered no evidence that the stated reason was a pretext; (2) the Court improperly submitted to the jury plaintiff's evidence of retaliatory acts occurring prior to the enactment of the Civil Rights Act of 1991; and (3) none of Abbott's conduct prior to Place's disability leave, nor the requirement that she undergo independent testing at the conclusion of that leave, constituted adverse employment action. Abbott also argues that the evidence did not support the amount of the verdict. That contention is simply wrong and will not be addressed.

As to Abbott's stated ground for termination: failure to submit to psychological testing, a reasonable jury could have found that following her complaint of sexual harassment, Abbott failed o adequately address her charges and when she persisted, she became the villain. The jury could have found that Abbott believed that the entire situation with Place and Harrington was untidy and uncomfortable and, unlike Place, Abbott just wanted

the entire matter to go away. When Place persisted, Abbott punished her for her persistence by erecting hurdles for Place to overcome to remain at Abbott.

*3 As to Abbott's complaint that this court improperly permitted the jury to consider evidence of retaliatory acts which occurred prior to the enactment of the Civil Rights Act of 1991, this court has previously held that such acts could be addressed as part of a continuing violation. There is no need to revisit that decision.

As to Abbott's claim that none of the acts alleged to constitute retaliation constitute adverse employment actions, this court merely notes the decision of the Seventh Circuit Court of Appeals in Knox v. State of Indiana, 93 F.3d 1327, 1330:

> Adverse actions can come in many shapes and sizes. No one would question the retaliatory effect of many actions that put the complainant in a more unfriendly working environment; brightly lit office to a dingy closet, depriving the person of previously available support services ... or cutting off challenging assignments.

A reasonable jury could have found that Abbott's actions following Place's complaint constituted adverse employment actions.

Abbott also claims that Place is not entitled to back pay for the period in which she was enrolled in law school. That argument is rejected. Place testified that she tried to find work and when she could not, used the financial aid provided by law school to sustain herself. See Hanna v. American Motors Corp., 724 F.2d 1300.

CONCLUSION

For the foregoing reasons, the Renewed Rule 50(b) Motion is denied.

United States Court of Appeals, Seventh Circuit.

Linda PLACE, Plaintiff-Appellee/Cross-Appellant,
v.
ABBOTT LABORATORIES, Defendant-Appellant/Cross-Appellee.
Nos. 99-2418, 99-2971.

June 9, 2000

Before Hon. TERENCE T. EVANS, Circuit Judge.

Upon consideration of the PLAINTIFF-APPELLEE'S MOTION FOR EXTENSION OF TIME, filed on June 7, 2000, by the pro se appellee/cross-appellant,

IT IS ORDERED that the motion is GRANTED. The appellee/cross-appellant shall file her petition for rehearing, if any, by July 17, 2000.

United States Court of Appeals, Seventh Circuit.

Linda PLACE, Plaintiff-Appellee/Cross-Appellant,
v.
ABBOTT LABORATORIES, Defendant-Appellant/Cross-Appellee.
Nos. 99-2418, 99-2971.

July 27, 2000

Before BAUER, KANNE, and EVANS, Circuit Judges.

ORDER

On June 30, 2000, Linda Place filed a petition for rehearing and petition for rehearing en banc. All the judges on the original panel have voted to deny a rehearing, and none of the judges in active service have requested a vote on the petition for rehearing en banc. The petition for rehearing and rehearing en banc are therefore DENIED.

(2)

No. 00-677

Supreme Court, U.S.
FILED
NOV 27 2000
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

LINDA PLACE,
Petitioner,

v.

ABBOTT LABORATORIES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Whether the Seventh Circuit's fact-bound application of well settled principles under FRCP 50, as recently restated by this Court in *Reeves v. Sanderson Plumbing Prods., Inc.*, to Abbott's motion for judgment as a matter of law in this case requires the exercise of this Court's certiorari jurisdiction.

LIST OF PARTIES AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

In accordance with this Court's Rules 14.1(b) and 29.6, Respondent states that the parties to the proceeding in the Seventh Circuit are those in the caption of the case in this Court. Respondent further states that Abbott Laboratories has no parent companies and no publicly-traded company owns ten percent or more of the stock of Abbott Laboratories.

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No. 00-677

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

LINDA PLACE, *Petitioner,*

v.

ABBOTT LABORATORIES, *Respondent.*

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Respondent Abbott Laboratories submits this brief in opposition to the petition for writ of certiorari filed by the petitioner, Linda Place. The opinions below and the statutory provisions involved are correctly set out in the petition.

JURISDICTION

The United States Court of Appeals issued its decision in this case on June 1, 2000. On June 9, 2000, the Seventh Circuit granted Petitioner Linda Place's motion for extension of time until July 17, 2000, to file a petition for

rehearing. On June 30, 2000, Place filed a Petition for Rehearing and Suggestion for Rehearing En Banc. On July 27, 2000, the Seventh Circuit denied Place's Petition for Rehearing and Suggestion for Rehearing En Banc. All judges on the original panel voted to deny rehearing, and none of the judges in active service on the Seventh Circuit Court of Appeals requested a vote on the petition for rehearing en banc. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Course Of Proceedings And Dispositions Below

Petitioner Linda Place sued Abbott Laboratories, her former employer, for damages under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*[1] She relied on the Civil Rights Act of 1991 ("CRA"), which amended Title VII effective November 21, 1991 to allow for recovery of compensatory and punitive damages, within prescribed caps, and for jury trials in cases where such damages are sought. 42 U.S.C. § 1981a. She alleged, among other things, that she had been sexually harassed while employed at Abbott and that Abbott had retaliated against her for complaining about her alleged harasser. *Place v. Abbott Laboratories*, 215 F.3d 803, 806 (7th Cir. 2000). Place's Second Amended Complaint initially included five counts, all of which were disposed of in Abbott's favor prior to trial except Place's sexual harassment and retaliation claims. *Id.*; App. B-1-12, 33-34. At a trial held between December 9, 1997 and December

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[1] References to the record before the Court of Appeals will be as follows: to Abbott's Required Short Appendix: "App. A-__"; to Abbott's Separate Appendix: "App. B-__"; to the Transcript of Proceedings, "Tr. __."

18, 1997, the district court judge acted as fact finder as to Place's sexual harassment claim and a jury acted as fact finder as to her retaliation claim. In a 34-page Memorandum Opinion, the district court found Place had not been sexually harassed at Abbott, that Place's sexual relationship with her then supervisor (Charles Harrington, Ph.D., who was not Mrs. Place's husband) was consensual, and that Place had not been subjected to a hostile environment. *Place*, 215 F.3d at 806; App. A-9-42. In making these findings, the district court repeatedly found that Place was not a credible witness. *Id.*; App. A-4, 6, 8, 11, 16-17, 32-33, 35. In accordance with its findings, the district court entered judgment in favor of Abbott on Place's sexual harassment claim. Place did not appeal this judgment. *Place*, 215 F.3d at 806.

The jury, in contrast, found that Abbott had retaliated against Place. The jury's verdict, although unexplained, presumably was based on Place's claims that she suffered the following retaliatory acts: (1) on October 21, 1991 (prior to the enactment of the CRA) Abbott transferred Place and Harrington to different positions in an effort to alleviate work-related difficulties caused by their soured affair, App. A-16-17; and (2) in May, 1992 (after the enactment of the CRA), Abbott's health department advised Place that she was required to complete an independent medical examination ("IME") before she would be allowed to return to work from a self-imposed disability leave. *Id.* at 807. Place refused to participate in the IME and consequently, in November, 1992, she exhausted her 12-month disability leave without returning to Abbott and was terminated in accordance with Abbott's long-standing disability leave policy. *Id.* at 806.

Before and after the jury's verdict, Abbott filed a Rule 50 motion arguing, *inter alia*, that: (a) as a matter of

law, Place was not entitled to recover damages for, or have a jury trial on, alleged adverse employment actions occurring before November 21, 1991 (the effective date of the CRA), Tr. 838, 1113-18; App. B-65-66, 70-75; (b) the district court erred as matter of law in applying the "continuing violation" doctrine to effect retroactive application of the CRA, *Id.*; and (c) Place had failed to present a legally sufficient evidentiary basis for a reasonable jury to conclude that Abbott had retaliated against her in a manner proscribed by law, Tr. 838-42, 1113-18; App. B-53-65. The district court denied Abbott's motions and entered judgment on the jury verdict in favor of Place in the amount of $514,656.01.[2] *Place*, 215 F.3d at 806.

Abbott appealed the jury's verdict and, in a unanimous panel opinion issued June 1, 2000, the Seventh Circuit Court of Appeals reversed the judgment in favor of Place, and remanded with instructions for the district court to enter judgment in favor of Abbott on Place's retaliation claim. *Place*, 215 F.3d 803. Specifically, the unanimous panel held that the district court committed reversible error by allowing the jury to consider and award damages for alleged retaliatory conduct that preceded the enactment of the CRA. *Id.* at 808-09. The district court had reasoned that the pre-CRA and post-CRA allegations formed a "continuing violation," which could properly be submitted in its entirety for jury decision. The Seventh Circuit disagreed, concluding the pre-CRA and post-CRA actions were not a continuing violation, but were separate and distinct. *Id.* Thus, there was no basis for submitting the pre-CRA allegations to the jury in contravention of

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[2] The jury's award was broken into two components: (1) $389,565.00 for lost wages and benefits; and (2) $125,000.01 in compensatory damages.

established law that the CRA does not enjoy retroactive application. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 252 (1994). Place does not seek review in this Court on this issue.

The Seventh Circuit further held that no reasonable jury could have found that Place's pre-CRA transfer or Abbott's post-CRA IME requirement constituted unlawful retaliation for Place's sexual harassment complaints made many months earlier. *Place*, 215 F.3d at 809-11. Therefore, the court held that the district court should have granted Abbott's Rule 50 motion. *Id.* In support of this holding, the Seventh Circuit relied on a wealth of uncontroverted facts, which are succinctly stated in the court's unanimous panel opinion.

B. Statement Of Facts

As found by the Seventh Circuit, Place's workplace difficulties at Abbott began when she and her then supervisor Dr. Charles Harrington "got drunk at a company Christmas party in December 1990 and afterward found their way into the same hotel bed." *Place*, 215 F.3d at 805. While Place claimed this sexual encounter with Harrington was coerced, the district court found otherwise, expressly discrediting Place's testimony on this and other subjects. *Id.* at 806; App. A-4, 6, 8, 11, 16-17, 32-33, 35. Place and Harrington's post-Christmas party encounter marked the commencement of an extended liaison. *Place*, 215 F.3d at 805-06. While Place could not recall on how many occasions or when she and Harrington actually stopped having sexual relations, she did recall their sexual encounters continued for at least four to six months and occurred both at and away from the workplace, and including at her husband's condominium and during a weekend she spent with Harrington in Chicago. *Id.*

In the Spring of 1991, Place was promoted from a grade 13 to a grade 15 scientist. *Id.* at 806. Also, as part of a routine progression of her project, Place was transferred to a different group where she reported to Meta Franklin instead of Harrington. *Id.* Place continued to work with Harrington albeit less frequently and on a co-worker level, as opposed to a supervisor/subordinate level. *Id.*; Tr. 140, 467-68, 501, 548-50, 881; App. A-19.

In July, 1991, Place complained to Abbott's employee relations department that Harrington was sexually harassing her. *Place*, 215 F.3d at 806; Tr. 176-77, 295-96, 628, 634. Specifically, Place reported that she and Harrington had been involved in a "relationship," that she had been trying to end their relationship, and she believed as a result, that Harrington was being uncooperative and "almost hostile" toward her in their working relationship. Tr. 176-78, 295-96, 641; App. B-255-57. Place did not complain that Harrington had coerced her into having or continuing their relationship. Tr. 639, 645-46, 688-89.

Abbott immediately conducted an investigation of Place's claims, which culminated in a meeting with Harrington at which Harrington was reminded of Abbott's policy prohibiting sexual harassment, and warned under threat of discipline and possible termination not to engage in harassing or intimidating behavior in the future. *Place*, 215 F.3d at 806; Tr. 652-54, 658, 813-14, 883-84; App. B-315. Abbott's employment relations manager told Place that Harrington had been warned not to engage in harassing behavior. Tr. 180-82, 659. Abbott also instituted a protocol by which Place interacted with Harrington only through or in the presence of Franklin. *Id.* Not long after, however, Place complained that communicating through Franklin was too cumbersome. Tr. 182, 660-61, 666. Accordingly,

Abbott approved Place's request to recommence direct communications with Harrington. Tr. 666.

As the Seventh Circuit found, throughout this time period, Place was a "tempestuous, high-maintenance employee who did good scientific work but had regular run-ins with her supervisors and co-workers." *Place*, 215 F.3d at 809. Franklin, whose testimony was specifically credited by the district court, App. A-21, testified that the project suffered from general communications problems, at least some of which were attributable to Place's poor interpersonal skills. Tr. 501, 549, 553, 563. For instance, Franklin cited an incident shortly after Place transferred to Franklin's group where one or more employees complained to Franklin about Place making a derogatory comment about the group's work space. Tr. 472-73, 479-80. On other occasions, Franklin witnessed or fielded complaints about Place's confrontational and demanding demeanor. *Place*, 215 F.3d at 809; Tr. 553-55.

When Franklin brought these problems to Place's attention, Place complained that she was stressed and overworked. Tr. 553-55. Consequently, Franklin told Place to scale back her hours and schedule a vacation, emphasizing that it was critical that Place improve her interpersonal skills and relationships with her co-workers. Tr. 555. Consistent with these instructions, when Place requested permission to attend an off-site meeting a few weeks later, Franklin granted Place permission to attend only a half day of the meeting so that her work demands would not pile up. Tr. 554-57. Place reacted angrily, leaning toward Franklin and threatening that Franklin would "pay for" her decision not to allow Place to attend the entire meeting. *Place*, 215 F.3d at 809; Tr. 554-60. Franklin also saw Place threaten co-worker Peggy Connerty, with whom Place had ongoing problems, and

who Place had previously described to Franklin as "incompetent." *Id.*

Place also continued to have problems working with Harrington. She complained repeatedly that Harrington was "non-cooperative" until October 21, 2000, when she announced that she no longer wanted to work with Harrington on their project. Tr. 197-98, 207-09, 606-07. Abbott obliged Place's request by transferring Place and Harrington to new positions. *Place*, 215 F.3d at 806; Tr. 212-13, 614-15, 684-85, 886-87. Neither Place nor Harrington suffered a reduction in pay, benefits, or job grade, which are the only criteria used at Abbott for comparing positions within the company. *Place*, 215 F.3d at 810; Tr. 618-19, 718-23, 727-30. In fact, Place was transferred to a vacant position on a different project that had previously been performed by a grade 17 scientist (Place was a grade 15 scientist). *Place*, 215 F.3d at 810; Tr. 745. Nevertheless, both Place and Harrington perceived their transfers as demotions. Tr. 217, 817-18, 920. Place in particular believed her new position was inferior because she had to do more lab work (she was a scientist) and because she no longer had the same supervisory responsibilities. *Place*, 215 F.3d at 810; Tr. 217.

After her transfer, Place put herself on an indefinite medical leave, at full salary, beginning November 17, 1991. *Place*, 215 F.3d at 806; Tr. 229, 958; App. B-265, 311-14. After six months of leave, and as her continued full salary benefits were due to run out, Place obtained a note from her doctor (a psychologist) stating, "Linda Place is planning to return to work on Friday, May 15, 1992." *Place*, 215 F.3d at 806; App. B-260. Upon receipt of this note, Abbott's Director of Corporate Employee Health (Brockton Weisenberger, M.D.) spoke with Place's doctor (with

Place's permission). Tr. 237-39, 758-62; App. B-258-59. Dr. Weisenberger also met with Place's managers and with Place individually. *Id.* While meeting with Place, Dr. Weisenberger took note of the fact that Place "ha[d] a note pad with her and appear[ed] to be actively taking notes of everything said during the conversation." *Id.* Place had previously requested to tape record all conversations she had with health department personnel. *Id.* In light of Place's paranoid behavior, and in an effort to confirm that she was well enough to return to work, Dr. Weisenberger decided that Place should undergo an IME. *Id.* When Dr. Weisenberger shared this decision with Place's personal psychologist, Place's doctor responded that she understood Abbott's concerns and desire for a second opinion. *Place*, 215 F.3d at 809; Tr. 237-39, 758-62; App. B-258-59.

Abbott referred Place to Lake Cook Psychologists (not affiliated with Abbott) where she was scheduled to see Dr. John Jochem for an IME. *Place*, 215 F.3d at 806; Tr. 240, 326; App. B-297, 329-30. For several months and despite Abbott's persistent prodding, Place refused to see Dr. Jochem. Tr. 241-43, 248-49, 328-29; App. B-294, 297-300. Finally, on August 20, 1992, she reported to Dr. Jochem's office where, before the examination began, Place took out a tape recorder and began recording everything. *Place*, 215 F.3d at 806; Tr. 251-52, 713. When Dr. Jochem objected to the tape recorder, Place walked out of his office without participating in the IME. *Place*, 215 F.3d at 806; Tr. 253-55, 713, 718; App. B-294, 296, 316-17, 327-28. Thereafter, she never rescheduled another appointment with Dr. Jochem. *Id.*

Abbott eventually terminated Place on December 2, 1992 pursuant to Abbott's Personnel Policy No. 184, which provides that an employee on a disability leave of absence will be separated from the Company upon the date on

which her total leave exceeds one year. *Place*, 215 F.3d at 806; Tr. 960-62, 970-71, 1111; App. B-266-68, 308-10. It was undisputed that Abbott's policy is applied uniformly and that numerous other employees have been terminated for the same reason. *Id.*

C. The Seventh Circuit's Decision, Place's Petition For Rehearing And Suggestion For Rehearing En Banc, And The Seventh Circuit's Denial Of Same

In considering Abbott's appeal of the jury's verdict, the Seventh Circuit recognized the limits of its role under FRCP 50. Specifically, the court framed the issue on appeal as "whether a rational jury could have reached the result this jury reached." *Place*, 215 F.3d at 808. In undertaking its analysis, the court acknowledged that it could not "substitute [its] view of contested evidence for the jury's." *Id.* Additionally, the court cited its prior precedent, which states that the inquiry under FRCP 50 is limited to "'whether the evidence presented, combined with all reasonable inferences permissibly drawn therefrom, is sufficient to support the verdict when viewed in the light most favorable to the party against whom the motion is directed.'" *Id.*, *citing*, *Mathur v. Board of Trustees of S. Ill. Univ.*, 207 F.3d 938, 941 (7th Cir. 2000).

After identifying the standard of review under FRCP 50, the Seventh Circuit applied that standard in straightforward fashion to the facts presented in this case. Based on the foregoing facts, the Seventh Circuit concluded that no reasonable jury could have found that Abbott's decision to transfer Place in October, 1991, or to require an IME before allowing Place to return to the workplace from her self-imposed disability leave in May, 1992, constituted actionable retaliation for Place's sexual harassment complaints made almost a year prior. *Place*,

215 F.3d at 809-11. Accordingly, the unanimous Seventh Circuit panel opinion reversed the jury verdict for Place, and remanded with instructions for the district court to enter judgment for Abbott on Place's retaliation claim. *Id.*

Following the Seventh Circuit's decision, Place filed a Petition for Rehearing and Suggestion for Rehearing En Banc, in which she presented to the Seventh Circuit all of the arguments she now presents to this Court. Indeed, the instant Petition for Writ of Certiorari is drawn verbatim from Place's Petition for Rehearing in significant part. Specifically, Place argued to the Seventh Circuit, as she does in the instant Petition for Writ of Certiorari, that "the panel erred by bending the record in favor of Abbott, citing self-interested defense testimony that a jury already rejected, in violation of *Reeves v. Sanderson Plumbing Prods.*" Pet. for Rehearing, 7. Accordingly, Place requested reconsideration of the panel's unanimous decision, and suggested reconsideration by the Seventh Circuit en banc, in light of this Court's decision in *Reeves*. The Seventh Circuit denied Place's Petition for Rehearing. All of the judges on the original panel voted not to rehear the case, and no judge in active service on the Seventh Circuit called for a vote on Place's request for rehearing en banc.

ARGUMENT

This case offers no special or important reason for a grant of the requested Writ of Certiorari. The Seventh Circuit's decision is a straightforward, fact-bound application of settled law to the particular facts of this case. Contrary to Place's contentions, the Seventh Circuit's decision represents no divergence from the pronouncements of this Court. Moreover, the FRCP 50 principles that form the basis of Place's petition do not raise unsettled questions of federal law and procedure. Rather,

the Seventh Circuit's decision in this case applied well-established Rule 50 principles in a manner wholly in accord with this Court's recent decision in *Reeves v. Sanderson Plumbing Prods., Inc.*, __ U.S. __, 120 S. Ct. 2097 (2000).

I. THE SEVENTH CIRCUIT'S OPINION CORRECTLY APPLIED ESTABLISHED FRCP 50 PRINCIPLES, CONSISTENT WITH THIS COURT'S RECENT DECISION IN *REEVES v. SANDERSON PLUMBING PRODS., INC.*

Place's petition for writ of certiorari is grounded on the proposition that this Court in *Reeves* drastically altered the legal landscape as it pertains to the standard of review under Rule 50. From this faulty proposition, Place argues that the Seventh Circuit erroneously applied these allegedly new standards in its review of the particular facts of this case. Place is incorrect on both counts.

A. *Reeves* Did Not Make New Law

In *Reeves*, 120 S. Ct. 2097, the plaintiff claimed his employer fired him because of his age, in violation of the Age Discrimination in Employment Act ("ADEA"). At trial, the district court twice denied the defendant employer's motion for judgment as a matter of law under Rule 50 before properly instructing the jury that "[i]f the plaintiff fails to prove age was a determinative or motivating factor in the decision to terminate him, then your verdict shall be for the defendant." *Id.* at 2097.

The jury returned a verdict for the plaintiff, and the district court thereafter denied the defendant's renewed motion for judgment as a matter of law. On appeal, the Fifth Circuit Court of Appeals reversed, holding that the plaintiff had not introduced sufficient evidence to sustain the jury's finding of age discrimination. Critically, the Fifth

Circuit allowed that the plaintiff "very well may have" presented sufficient evidence for a "reasonable jury [to] have found that [the respondent's] explanation for its employment decision was pretextual." *Id.* The Fifth Circuit further explained, however, that it did not consider this evidence, standing alone, to be dispositive of the ultimate issue — *i.e.*, whether plaintiff presented sufficient evidence to permit a reasonable determination that he was terminated because of his age. *Id.*

This Court granted certiorari to resolve a compelling issue of employment law that had divided the federal Courts of Appeals — namely, "whether a plaintiff's prima facie case of discrimination . . . combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination." *Id.* Disagreeing with the Fifth Circuit, this Court held that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification [for its actions] is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* 2109. The *Reeves* Court stated:

> This is not to say that such a showing by the plaintiff will always be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other,

> nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination occurred.

Id.

Given its holding that a plaintiff's prima facie case and evidence of pretext may, but will not always support a finding of unlawful discrimination, the Court in Reeves considered whether, on the record presented, judgment as a matter of law was warranted in the employer's favor. In undertaking this further analysis, the Court identified only a "semantic" conflict among the Courts of Appeals' differing formulations as to what evidence a court is to consider in ruling on a Rule 50 motion. *Id.* at 2110. Whereas some Courts of Appeals decisions have stated that "review is limited to that evidence favorable to the non-moving party," others have held that review "extends to the entire record, drawing all reasonable inferences in favor of the nonmovant." *Id.* at 2109-10.

In resolving this semantic conflict, the Court clarified in *Reeves* that "in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record." The Court further stated, consistent with its prior decisions, that in reviewing the record in the Rule 50 context, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Id.* Stated another way, the Court instructed:

> although the court should review the record as a whole, it must disregard all evidence to the moving party that the jury is not required to

> believe. See Wright and Miller 299. That is, the court should give credence to the evidence favoring the nonmovant as well as to that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses."

Id.

Applying these standards, the *Reeves* Court concluded the Fifth Circuit improperly disregarded critical evidence favorable to the plaintiff — namely the evidence supporting the plaintiff's prima facie case and establishing that the employer's stated justification was false. *Id.* at 2111. Further, the Fifth Circuit failed to draw reasonable inferences in favor of the plaintiff from additional evidence suggesting that the termination decision was impacted by the employer's age-based animus. *Id.* Therefore, the Court reversed the Fifth Circuit's decision, reinstating the jury's verdict. *Id.* at 2112.

Thus, as stated in the opinion, this Court granted certiorari in *Reeves* to resolve an important split among the federal circuits involving the so-called "pretext-plus" debate which had permeated the employment discrimination arena since the Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742 (1993). *See Reeves*, 120 S. Ct. at 2104-05 (noting split in circuits as to whether prima facie case plus evidence of pretext is sufficient to create jury issue, or whether plaintiff must additionally present evidence of discrimination over and above proof of pretext). After resolving this issue, and in the course of applying its holding in *Reeves* to the facts presented, the Court identified and clarified what it termed a "semantic" distinction between the Rule 50 standards utilized in various circuit court opinions. Specifically,

Reeves confirmed that the court's role in deciding a motion for judgment as a matter of law is to review all of the evidence in the record, not just that evidence which is favorable to the nonmoving party.

Beyond this guidance, *Reeves* does not, contrary to Place's petition, alter the well settled principles governing the courts' role under Rule 50. Thus, it has long been an established part of Rule 50 jurisprudence that the court may not make credibility determinations or weigh the evidence, as those are functions reserved unto the jury. *See, e.g., Lytle v. Household Mfg., Inc.*. 494 U.S. 545, 554-55, 110 S. Ct. 1331, 1338 (1990) (stating that in deciding a Rule 50 motion, court draws all factual inferences in favor of the nonmoving party, and does not weigh the evidence or make credibility determinations); *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 696-97 & n.6, 82 S. Ct. 1404, 1409 (1962). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-52, 106 S. Ct. 2505 (1986) (stating same ~~principle~~s in conjunction with analogous standard applicable to motions for summary judgment); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548 (1986) (same).

B. The Seventh Circuit Correctly Applied FRCP 50 Standards To The Particular Facts Of This Case

The Seventh Circuit's decision in this case does not deviate from *Reeves*. To the contrary, the Seventh Circuit's opinion echoes *Reeves*' articulation of the Rule 50 standard, explaining that in reviewing the district court's denial of Abbott's Rule 50 motion:

> the question is whether a rational jury could have reached the result this jury reached. [*Mathur v. Board of Trustees of S. Ill._Univ.*,

> 207 F.3d 938, 941 (7th Cir. 2000)]. In deciding this question, we may not substitute our view of contested evidence for the jury's.

Place v. Abbott Laboratories, 215 F.3d 803, 809 (7th Cir. 2000). The *Mathur* opinion, cited by the *Place* panel, is even more explicit in this regard:

> we limit our inquiry [in the Rule 50 context] to "whether the evidence presented, combined with all reasonable inferences permissibly drawn therefrom, is sufficient to support the verdict when viewed in the light most favorable to the party against whom the motion is directed. . . . In other words, we are limited to assessing whether no rational jury could have found for the plaintiff." . . . In doing so, "this court may not step in and substitute its view of the contested evidence for the jury's."

Mathur v. Board of Trustees of S. Ill. Univ., 207 F.3d 938, 941 (7th Cir. 2000).

Nowhere does the Seventh Circuit's opinion in this case make reference to, much less abrogate, the semantic distinction this Court clarified in *Reeves*. The distinction the *Reeves* opinion resolved was not presented in this case. Nor does the Seventh Circuit's unanimous panel decision purport to create new law in the Rule 50 context. To the contrary, the Seventh Circuit's opinion applies settled Rule 50 principles to the particular facts of this case.

As the Seventh Circuit held, "[t]he record does not support an inference that Abbott was retaliating against Place's earlier complaints of sexual harassment by requiring her to take an independent medical examination before returning to work from a long disability leave." *Place*, 215

F.3d at 809. In support of this holding, the Seventh Circuit relied on an abundance of uncontroverted facts:

- Place was seeking to return to work from a self-imposed disability leave prompted by emotional problems she claimed to have been caused by various aspects of her employment with Abbott. *Place*, 215 F.3d at 809.

- Abbott required any employee who had been out on disability leave for at least five days to coordinate their return to work with the company's health department. *Id.*

- While Abbott did not require every employee returning to work from a long disability leave to undergo an IME, such was not unusual. *Id.*

- Indeed, Abbott's then director of corporate employee health testified without contradiction that every year, numerous employees returning to work from disability leaves were sent for IMEs that included psychological evaluations. *Id.*

- Dr. Weisenberger's decision to require Place to undergo an IME before returning to work was premised on a legitimate, supported concern that Place was so angry with the company that she might do harm if returned to the workplace.[3] *Id.*

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[3] Place claims in her petition, as she did before the Seventh Circuit, that Dr. Weisenberger's decision to require an IME was contradicted by Abbott's manager of Corporate EAP,

- Prior to her leave of absence, Place was a "tempestuous, high-maintenance employee who did good scientific work but had regular run-ins with her supervisors and co-workers," which included on at least two occasions Place threatening a supervisor and a co-worker. *Id.*

- Place openly exhibited paranoid behavior in dealing with Abbott, including seeking to tape record meetings with Abbott management and actively writing down every word uttered by Weisenberger during their conversations. *Id.*; *see also* Tr. 759-62; App. B-258-59.

- Place's treating psychologist, who believed Place was ready to return to work, and posed no danger, acknowledged that she understood Abbott's desire to seek a second opinion via the IME. *Place*, 215 F.3d at 809.

- No competent evidence exists in the record to suggest that any employees similarly situated to Place were treated more favorably. *Id.*

Dr. Rochelle Dainas. Place supports this assertion with a citation to notes taken by Dr. Jochem, which she submits reflect admissions from Dr. Dainas that Place's return to work posed no danger to Abbott. Place's description of this evidence is materially incomplete and misleading. The excerpt from Dr. Jochem's notes cited by Place states: "Chelle [Dainas] doubts dangerousness, but is worried re: sabotaging dept. work." *See* Place's Separate Appendix to the Court of Appeals at D-127. Thus, Dr. Jochem's notes, and Dr. Dainas' concerns are entirely consistent with Dr. Weisenberger's stated reasons for requiring an IME.

- Place's sexual harassment complaints, for which she claimed the IME requirement was retaliatory, were made over almost a year before Dr. Weisenberger's decision to require an IME before allowing Place to return to work. *Id.* at 810.

- Dr. Weisenberger, who made the decision to require Place to undergo an IME, had nothing whatsoever to do with addressing or responding to the sexual harassment complaints Place nearly a year prior. Tr. 176-77, 295-96, 628, 634, 641, 652-54, 688-89, 658, 813-14, 883-84; App. B-255-57, 315.

- Place's ultimate termination was a ministerial result of her exceeding the maximum 12 months allowed under Abbott's leave policy, and was effectuated by an administrative employee who had nothing whatsoever to do with the IME requirement, or Place's prior sexual harassment complaints. *Place*, 215 F.3d at 806, 810; Tr. 970; App. B-266-68.

Similarly, the Seventh Circuit concluded that it was "dubious" whether Place's pre-CRA transfer constituted an "adverse employment action" within the meaning of Title VII. *Place*, 215 F.3d at 810. In any event, the court found "no evidence" to support Place's claim that the transfer was in retaliation for her earlier sexual harassment complaints. *Id.* Again, the Seventh Circuit's decision is amply supported by undisputed facts:

- Place's transfer did not involve a change in pay or benefits or job grade, which are the

only criteria for comparing jobs among Abbott's various operations. *Id.*

- Place was transferred to a position which was formerly performed by a higher grade scientist. *Id.*

- Abbott's business of "[r]esearching, creating, and preparing for mass production pharmaceutical products is a dynamic business that involves regularly shifting people from one job to another, as one project is completed and another is begun." *Id.*

- Thus, Place was not guaranteed to stay in the position she held prior to the transfer, and in fact, the practice at Abbott was such that Place would likely have been transferred to a new position on a new project. *Id.*

- Similarly, "[s]upervising other workers in one capacity [at Abbott] did not mean that person would always have supervisory duties thereafter." *Id.*

These facts are uncontroverted in the record. Nevertheless, Place argues the Seventh Circuit violated *Reeves* in relying on these facts because they were established through testimony offered by Abbott's witnesses. Latching onto and taking out of context a single phrase from the *Reeves* opinion, Place reads that decision to stand for the proposition that in reviewing a motion under Rule 50 (or a motion for summary judgment, given that the same standard applies), a court may *never* consider evidence from the moving party's witnesses. A fair reading of *Reeves* reveals that such was not this Court's holding.

As stated above, the *Reeves* opinion resolves a semantic distinction in the Courts of Appeals' prior articulations of the Rule 50 standard of review. *Reeves* instructs that in considering a Rule 50 motion, the court should review "all of the evidence in the record." *Reeves*, 120 S. Ct. at 2110. In doing so, the court "*should* give credence to the evidence favoring the nonmovant *as well as* that 'evidence supporting the moving party that is uncontradicted and unimpeached *at least* to the extent that that evidence comes from disinterested witnesses." *Id.* (emphasis added). Contrary to Place's contentions, nowhere does *Reeves* suggest that the *only* evidence a court may consider in the Rule 50 context is that which comes from disinterested witnesses.

Place's twisted reading of *Reeves* would turn Rule 50 on its head. Further, contrary to well established policy favoring the entry of summary judgment in cases where there are no material facts in controversy, *see, e.g., Celotex*, 477 U.S. 317, 328 (1986) (stating that summary judgment is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the federal rules as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action.'") (citations omitted), Place's interpretation of *Reeves* would rule out summary judgment in the vast majority of cases in which it is now appropriate.

Indeed, this aberrant result would be particularly likely to occur in employment cases, where much of the evidence an employer is required to produce — *e.g.*, evidence of the employer's treatment of similarly situated employees — would be deemed useless in deciding summary judgment to the extent it is undisputed, but uniquely found in the company's records, or explained by the company's representatives. Similarly, in cases like this

one where material facts are equally known to the plaintiff and the employer, under Place's cramped interpretation of *Reeves*, the plaintiff could stave off summary judgment simply by refusing to testify on the point. For instance in this case, Place's supervisor Meta Franklin testified that Place had threatened her and a co-worker on separate occasions. Place could have denied these threats, but did not. Now, she faults the Seventh Circuit for relying on Franklin's unrebutted testimony. These arguments are not well-founded, as contrary to Place's claims, this Court wisely did not change existing Rule 50 law in *Reeves*.

Finally, Place criticizes the Seventh Circuit for failing to consider evidence supporting her retaliation claims. This argument is simply a fact-bound critique that the Seventh Circuit incorrectly applied the law, an allegation that even if true, is not worthy of review by this Court. In any event, the Seventh Circuit got it right. Place cites evidence of a March 17, 1992 meeting among several Abbott managers including Dr. Weisenberger, at which Place's potential return to work was discussed. Contrary to Place's claims, the Seventh Circuit did consider this meeting, as it featured prominently in Place's brief on appeal. Place deems this meeting significant because the EAP Consultation notes from this meeting state that its purpose was "re [Place's] allegation re sexual harassment." App. B-288. The Consultation notes further identify the consensus reached at the meeting, namely that "[Place] will be sent extended disability forms. Before [Place] can return to work, Emp. Health will need clear documentation that [Place] can perform her job as required." *Id.* Further, Dr. Weisenberger's notes from this same meeting relate, "Ms. McClain discusses multiple difficulties with the employee in the workplace and it is agreed that should she be released to return to work that she not be allowed to do so by Employee Health until further discussions are

conducted with Personnel and her department manager." App. B-258-59.

Presented with this evidence, the Seventh Circuit correctly concluded that it fails to constitute proof of the required "but for" causal nexus between Place's sexual harassment claims and Dr. Weisenberger's decision to require an IME. *McKenzie v. Illinois Dept. of Transp.*, 92 F.3d 473, 483 (7th Cir. 1996) ("In order to demonstrate the 'causal link' [for purposes of Title VII retaliation claim], [the plaintiff] must demonstrate that IDOT would not have taken the adverse action 'but for' the protected expression."). The evidence establishes only that Dr. Weisenberger was advised by Place's managers of the workplace difficulties that led to Place's disability leave. That Place's sexual harassment claim appears to have been mentioned briefly by way of medical background does not constitute even a scintilla of evidence of retaliation. Indeed, it would have been curious if Dr. Weisenberger, who was gathering information regarding the events that led to Place's medical leave of absence and the perceived safety issues associated with her return, had not learned of her sexual harassment claim. Equally significant, the evidence Place relies upon regarding this meeting supports Dr. Weisenberger's testimony as to the "decisions" that were made at the meeting, which were simply to offer Place extended disability benefits and to coordinate further regarding her potential return to work. These "decisions" amount to nothing more than what Abbott's practice and policy require anyway. Tr. 804-05, 963-69, 1042-43; App. B-295, 327-28, 333.

In sum, *Reeves* clarified a semantic distinction in the Courts of Appeals prior articulations of the Rule 50 standard — a distinction which was never presented in this case. *Reeves* did not create new law, but rather confirmed

well settled Rule 50 standards. The Seventh Circuit cited and correctly applied these standards in a manner wholly consistent with *Reeves* in concluding that the record evidence, viewed in a light most favorable to Place, does not sustain the conclusion that Place's October, 1991 transfer or IME requirement were in retaliation for her having engaged in protected activity.

II. THE RELIEF REQUESTED BY PLACE'S PETITION CANNOT BE AWARDED.

Place asks this Court to summarily reverse the Seventh Circuit's decision, or alternatively, to vacate the Seventh Circuit's decision and remand for reconsideration in light of *Reeves*. For the reasons stated above, this requested relief is not justified. However, Place's requested relief cannot be awarded for an additional reason. Place's petition wholly ignores a fundamental error identified by the Seventh Circuit in which the jury was improperly permitted to decide liability based on acts that occurred prior to the enactment of the CRA. *Place*, 215 F.3d at 807-09. Contrary to Place's arguments, the Seventh Circuit refused to find this error harmless. *Id.* at 808. Therefore, even if Place is correct regarding her interpretation of the *Reeves* decision (and she is not), her requested relief cannot be awarded. Rather, even if this case was remanded to the Seventh Circuit for additional consideration, the fundamental errors committed by the district court (for which Place has not requested review in this Court) would require, at a minimum, a new trial. Such an outcome would render this Court's review nugatory, and further justifies the denial of Place's petition.

III. THIS CASE DOES NOT PRESENT AN ISSUE OF GREAT NATIONAL IMPORTANCE; RATHER, THE FACT-SPECIFIC REVIEW PLACE SEEKS FROM THE COURT WOULD HAVE APPLICATION ONLY TO HER PARTICULAR CASE.

Place's half-hearted assertion in the closing half-page of her petition that this case involves issues of great national importance is meritless on its face. As stated above, the Seventh Circuit correctly applied Rule 50 standards as articulated in *Reeves*. Even if it did not, however, given this Court's decision in *Reeves*, there can be no legitimate claim that there remains confusion among the lower federal courts as to the proper standard of review in the Rule 50 context. Indeed, given *Reeves*' recent vintage, its articulation of the Rule 50 standard cannot be said to have sufficiently percolated through the lower courts as to reveal whether further analysis and explanation from this Court is warranted. At most, the instant petition for certiorari seeks an error correction, based on the application of established Rule 50 standards to the particular and isolated facts of this case, which is not an appropriate basis for the exercise of this Court's certiorari jurisdiction.

CONCLUSION

For all the foregoing reasons, the petition does not state a basis upon which the proposed writ of certiorari should be granted. Respondent respectfully requests that the petition be denied.

Respectfully submitted,

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